

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Thomas Keating,

Plaintiffs,

-against-

Leviton Manufacturing Co., Inc.,

Defendants.

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**REPORT AND
RECOMMENDATION**
CV 06-6027 (JS)(ARL)

LINDSAY, Magistrate Judge:

The plaintiff filed this action on November 9, 2006 under the Fair Labor Standards Act and state law. On July 28, 2008, counsel for the plaintiff filed a suggestion of Thomas Keating's death. On August 19, 2008, after the parties failed to appear for the final conference, the court scheduled a telephone conference to address the suggestion of death. This conference was set for November 2, 2008, more than ninety days after the filing of the suggestion of death.

At the November conference, plaintiff's counsel reported that the plaintiff's estate had not responded to repeated letters apprising the estate of this action. Further, no motion for substitution has been made by a party or the estate as required by Rule 26(a)(1). When no motion for substitution has been made within ninety days after service of a statement noting the death of a party, the action must be dismissed. FED. R. CIV. P. 26(a)(1). Given that the time has elapsed and plaintiff's estate has shown no interest in pursuing this action despite repeated opportunities to do so, the undersigned respectfully recommends that the District Court dismiss this case with prejudice.

A copy of the Report and Recommendation is being sent by the court to counsel for all parties. Counsel for the plaintiff is also directed to serve a copy of the report and recommendation to the plaintiff's estate. Any objections to this Report and Recommendation must be filed with the Clerk of the Court with a courtesy copy to the undersigned within 10 days of service. Failure to file objections within this period waives the right to appeal the District Court's Order. *See* 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 72; *Beverly v. Walker*, 118 F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York
January 6, 2009

/s/
ARLENE R. LINDSAY
United States Magistrate Judge